Waste Stream Management, Inc. *and* International Brotherhood of Teamsters, Local 687, AFL–CIO. Cases 3–CA–16717, 3–CA–16871, and 3–CA–16976

December 22, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The questions presented here are whether the administrative law judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by taking several adverse employment actions, including discharge, against employee Vern Arno, and that it engaged in other conduct which violated Section 8(a)(1) of the Act.[1] The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Waste Stream Management, Inc., Canton and Potsdam, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On June 17, 1994, Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Robert Ellison, Esq., for the General Counsel.
Daniel S. Cohen, Esq., of Utica, New York, for the Respondent.
Christy Concannon, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. This case was tried for 5 days in late 1992 in Canton and Potsdam, New York. The amended consolidated complaint alleges that Respondent violated Section 8(a)(1) of the Act by discriminatorily promulgating new employee work rules, soliciting an employee to survey and report on the work duties of employee Vern Arno because of Arno's union activities, informing employees that it was seeking to force Arno to quit because of his union activities, promising and granting employees increased benefits to dissuade its employees from supporting the Charging Party Union (the Union), and interrogating its employees about their union sympathies and the union sympathies of their fellow employees. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against Arno on various occasions from July 22 through September 27, 1991, and by discharging him on September 30, all because of his union activities. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against employee Bryan Rose on various occasions from July 17 through December 1991 and by issuing him a disciplinary layoff on February 14, 1992, all because of his union activities. The Respondent answered, denying the essential allegations in the consolidated complaint. After the conclusion of the hearing, the General Counsel filed an unpaginated brief; the Respondent did not file a brief.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE EARLIER DECISION AND JURISDICTIONAL MATTERS

This is the second case I have heard involving this Respondent. The first case was tried in October 1991 and resulted in a decision (JD(NY)–96–93), [315 NLRB 1099] issued by me on November 3, 1993, finding that Respondent violated the Act by discriminating against employees because of their union activities, and by coercing employees in the exercise of their protected rights. I also set aside the Board-conducted election of April 5, 1991, because of Respondent's unlawful conduct. That decision is now pending before the Board.

I adopt the following description of Respondent's business from my earlier decision:

> The Respondent, at all times material herein, is and has been a New York Corporation with its principal place of business located at 145 Outer Maple Road, Potsdam, New York, and State of New York, and with facilities located at Potsdam, Canton, Gouverneur, Ogdensburg, and Parishville, New York (the Respondent's facilities), where it is engaged in the business of rubbish removal, recycling and scrap metal reprocessing, respectively. In the course and conduct of its business operations during the preceding 12 months, those operations being representative of its operation at all times material herein, the Respondent receives gross revenues in excess of $50,000 from the sale and direct shipment of recycled or processed materials from its facilities located in the State of New York to customers located outside the State of New York. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

In the prior case I found that Respondent committed numerous violations of the Act from late January through late

April 1991. The following conclusions from my earlier decision briefly summarize Respondent's extensive violations:

> 4. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by interrogating its employees concerning their union activities and the union activities of other employees, by soliciting grievances from its employees with explicit and implicit promises to rectify them, by suggesting to its employees that they could draw up a petition against the Union, by informing its employees that if the Union lost the election the Respondent would set up a grievance procedure, by soliciting its employees to sign a petition against the Union, by promising its employees various benefits including a grievance procedure in order to induce them to vote against the Union in the upcoming election, by creating the impression that it was keeping under surveillance the union activities of its employees, by promising and granting wage increases to its employees in order to dissuade them from supporting the Union, by terminating the employment of Eugene Prashaw and Robert Monroe and consolidating routes in order to redress grievances of its employees and dissuade them from engaging in activity on behalf of the Union, by telling an employee that he was being assigned more onerous working conditions because of his activities on behalf of the Union, by telling an employee that the Respondent was seeking a reason to terminate him because of his union activities and that this employee should forego such activities, by threatening to close its facilities because of the union activities of its employees, by informing an employee that he was being discharged because of his union activities, and by informing an employee that he was fired because of his union activities.
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> 5. The Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by imposing more onerous working conditions on employee Verde Snyder, and by discriminatorily terminating employees Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood and Vern Arno because these employees joined, supported or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection, and in order to discourage employees from engaging in such activities.

II. THE ALLEGED UNFAIR LABOR PRACTICES IN THIS CASE

The events in the instant case follow closely in time those covered in the prior case. Thus, the last incident found unlawful in the prior case occurred in late April 1991 and the first alleged unlawful incident in this case took place in July 1991. One of the alleged discriminatees in this case, rolloff driver Vern Arno, was found, in the earlier case, to have been discriminatorily discharged on April 15, 1991. He was reinstated, along with four other discriminatees, on July 15, 1991, after the complaint issued but before the trial in the earlier case. Following his reinstatement, Arno was allegedly the victim of numerous discriminatory incidents of harassment on the job over a period of several months, until he was again allegedly discriminatorily discharged in late September 1991. Rose, the other person allegedly discriminated against in this case, and another rolloff driver, testified in the prior case. The earlier violations were not remedied at the time of the alleged violations in this case and the events here cannot be viewed in isolation. They must be considered in light of Respondent's earlier violations and my determination that Respondent unlawfully interfered with the April 5, 1991 election and that another election should be held.

A. *The General 8(a)(1) Allegations*

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by granting certain benefits listed in an employee manual or handbook in November 1991 ''in order to dissuade its employees from supporting the Union.'' The handbook listed changes and improvements in bereavement pay, vacations, holidays, jury duty pay, educational assistance, a two-way communications plan, an employee survey procedure, a hot-line to management plan, a grievance procedure and an internal resolution dispute committee. It is not disputed that such a handbook with the specified changes and improvements was distributed to employees in group meetings in November 1991.

In the earlier case, I found that, prior to the Board election, Respondent held a meeting with employees at which it distributed a written survey seeking information as to how it could improve its labor relations. The survey included a question about union representation. I found that the survey included coercive interrogation and amounted to an unlawful solicitation of grievances with the implication of their resolution without a union, in violation of Section 8(a)(1) of the Act. I also found unlawful Respondent's solicitation of grievances with the implicit and explicit promise to resolve them in two other meetings with employees, one through its labor consultant, Edwin Ricker, and another through one of its vice presidents, James Bruno. Ricker spoke about new programs that would be instituted, including a grievance procedure and a wage initiative. (315 NLRB at 1116–1118.) In addition, I found unlawful promises of benefit made by Ricker in an employee meeting 2 days before the election, in which he told employees that the previously conducted survey had revealed concerns that Respondent intended to meet specifically, by instituting ''a new grievance procedure'' and ''a revised employee handbook.'' (315 NLRB at 1122–1123)

Thus Respondent had explicitly promised a new handbook before the election and, after the election, it delivered on that very promise. Moreover, before the election, it promised a new grievance procedure and, after the election, it delivered on that promise as well. At least five items in the handbook—the two-way communications, the survey procedure, the hot-line plan, the grievance procedure, and the internal resolution dispute committee—are directly related to the unlawful preelection promise of a grievance resolution procedure. The inclusion of these particular items in the handbook is therefore an unlawful grant of benefits in violation of Section 8(a)(1) of the Act.

The other five items in the handbook that are alleged to be unlawful grants of benefit—bereavement pay, vacations, holidays, educational assistance, jury duty pay and educational assistance—are less directly related because it is not clear in the record whether these benefits were specifically raised by employees as concerns unlawfully solicited by Re-

spondent before the election or specifically promised at that time by Respondent. However, the Respondent did specifically promise a revised handbook, a promise on which it delivered. This permits the inference, which I make, that the Respondent was, by including these items in its revised handbook, also delivering on its unlawful promises, unless it could show that the latter five items were not related to the unlawful preelection promises. Respondent has not made such a showing on this record. I therefore find that, on these items as well, Respondent unlawfully granted benefits in violation of the Act.

In sum, Respondent's issuance of a revised handbook in November 1991 was a continuation of the unlawful preelection conduct documented in my earlier decision. I also note that objections were pending to the conduct of the April 1991 election, which was set aside by my earlier decision, with the direction that a new one be held. Thus, the prospect of another election was not remote. See *Ambox Inc*., 146 NLRB 1520, 1521 (1964). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by granting the following benefits in its revised employee manual or handbook: changes and improvements in bereavement pay, vacations, holidays, jury duty pay, educational assistance, a two-way communications plan, an employee survey procedure, a hotline to management plan, a grievance procedure, and an internal resolution dispute committee.

The General Counsel also alleges that Respondent unlawfully interrogated employees about their feelings concerning union representation in February 1992 when it conducted a written survey of employees. This survey was similar to the one found unlawful in the earlier case, and it was one of the unlawfully granted benefits set forth in the revised handbook. This survey contained the same question about union representation that was found unlawful in the earlier survey in the prior case. According to Labor Relations Representative Coleen Wallace, the 1992 written survey was distributed to employees in group meetings and the employees were expected to return the surveys to Respondent. She testified that its purpose was the same as that for the earlier unlawful survey. In context, and because the same question was found unlawful in the earlier case, I find that the same interrogation in the February 1992 survey was also violative of Section 8(a)(1) of the Act.

The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by promulgating new work rules for its employees because of their activities on behalf of the Union. The record shows that, on July 15, 1991, the Respondent issued or posted documents setting forth certain work-rule changes, including use of a timeclock that had been installed some time before, stopping time directions, paid break periods, different lunch periods, overtime authorization requirements, Saturday scheduling, and a smoking prohibition. These changes applied to all employees.

Apart from a very abbreviated two paragraph statement of facts, the General Counsel's brief on this allegation is limited to the following analysis: ''[Respondent's] promulgation of new work rules on July 15, in light of the timing of the announcement and its overall course of conduct, is unlawful.'' The timing statement apparently refers to the date that Respondent reinstated five previously discharged employees, all of whom were drivers. I fail to see the significance of the timing of the work rule announcement because the new rules applied to all employees and, as Wallace testified, in promulgating these work rules, Respondent was simply formalizing some changes that had ''come into being'' over the past few months. An employer need not refrain from making nondiscriminatory work rule changes in the aftermath of a union campaign. For example, about this same time, Respondent also instituted a more formal employee evaluation procedure. This particular change was not alleged as unlawful and I must assume it was benign. Similar changes are simply the result of ordinary and necessary adjustments in running a business. Thus, I cannot make an inference of illegality solely on the basis of the timing of the announcement of the work rule changes.

Nor does the context of the work rule changes in the midst of other unlawful activity establish discrimination in the changes themselves. First of all, the unlawful activities had ceased after the election and none were alleged to have occurred between mid-April and mid-July 1991, when five discriminatorily discharged employees were reinstated. The work rule changes were not shown to have been related to the earlier violations, unlike the grant of the handbook benefits discussed above. Nor is there any other evidence that would show that the work rule changes were imposed for discriminatory reasons or to interfere with employee rights. Most of the rules themselves appear to be neutral, neither beneficial nor harmful to employees. One appears to be beneficial, the paid 15-minute break periods, but none appears to have been controversial. Some were simply clarifications of existing policy. And all appear to have had a legitimate business purpose. The installation of a timeclock to monitor tardiness is a time-honored management tool; and the ban on smoking is simply part of a health-related trend in the workplace. In these circumstances, I shall dismiss the allegation that Respondent's work rule changes were unlawfully promulgated because of the union activities of its employees.

B. *The Rose Allegations*

The complaint alleges that Respondent discriminated against Bryan Rose in several respects: On July 17, 1991, it issued a written warning to him and suspended him for 1 day for placing salt in a coffeepot; in late August 1991, it issued him a written warning, apparently for driving over some wood blocks; on December 3, it issued him a written warning for tardiness; in early December, it denied him a wage increase comparable to that granted to other employees; and, on February 14, 1992, it issued him a disciplinary 1-day layoff because he and another employee, Pete Wimmer, were ''standing around,'' not having left on their driving assignments 35 minutes after having punched in the morning before. About a week later, after serving the 1-day suspension, Rose voluntarily quit his employment. The General Counsel does not allege that Rose was unlawfully or constructively discharged. As specified below, I will dismiss all of the allegations with respect to Rose.

Rose was a known union supporter. He held at least one union meeting at his home and he testified on behalf of the General Counsel in the earlier case. He was not, however, the specific object of discrimination in that case. The General Counsel did offer testimony by Rose's supervisor, Terry Morehouse, that he was told by his superiors to ''watch the areas I put [Rose] in so I could keep a tighter eye on him.'' Morehouse was told to prevent Rose from delivering to

unionized plants at around the time of the Board election. Respondent's witnesses either denied the substance of Morehouse's testimony or gave it a business-related context. Even assuming that I accepted Morehouse's testimony, it does not establish the kind of animus directed toward Rose that would infect all the allegedly unlawful personnel actions subsequently taken against him. Those actions were independently supported by credible and sometimes uncontradicted testimony or uncontroverted documentary evidence. And none was tainted by union animus.

The coffeepot incident is illustrative. Rose admittedly poured the contents of a salt container into a coffeepot in the drivers' lunch- or breakroom in July 1991. When this was discovered, Vice President Chester (Skip) Bisnett became very angry and told Morehouse to ''pull'' the coffeepot until the perpetrator had submitted a written apology. Obviously, Bisnett's anger was precipitated by the incident itself because, at that point, he had no idea who was responsible. Rose did come forward, took responsibility, and apologized. Rose testified that, when he ''confessed'' to Morehouse, he was told that Bisnett ''was quite hot.'' As a result of his admitted culpability in this incident, Rose was issued a 1-day suspension. According to Rose, this was the first warning or suspension he had ever received.

Bisnett testified that he was concerned about the incident—even before he learned who was responsible—because the atmosphere at the facility was tense due to the reinstatement, 2 days before, of the employees who had been unlawfully discharged during the union campaign and the report that the employees who drank the salted coffee were not amused. Rose had admittedly left the lunchroom immediately after dumping the salt in the coffee and was not present when the salted coffee was discovered. In these circumstances, it is clear that Bisnett's concerns were genuine and unrelated to Rose's union activities.

The General Counsel seeks to support an inference of discrimination by pointing to other pranks at the facility, none of which resulted in disciplinary action. The evidence is insufficient to support a finding of discrimination. Some of these pranks were not specifically shown to have come to the attention of management, but those that did, and were described with at least some specificity, involved a perpetrator who was present or contemporaneously identified during or immediately after the prank. This is what differentiates what Rose did from an innocuous prank that is met with tension-releasing laughter. The affected employees had no idea what happened to cause the coffee to have been salted or why this was done. No other evidence of union animus directed toward Rose is apparent in any of the testimony about this incident. Accordingly, I find that the General Counsel has not proved by a preponderance of the evidence that Respondent discriminatorily disciplined Rose for the coffeepot incident.

The complaint also alleges that, in late August 1991, Rose was discriminatorily issued a written warning. The precipitating incident is not identified in the complaint, but it appears to involve a situation where Rose drove a truck over some wood blocks. Rose testified that the incident took place in late August when fellow employee Bob Converse, who apparently had some safety-related responsibilities, handed him a ''write up,'' which he immediately discarded. Rose also indicated that his supervisors, Morehouse and Albert (Gus) Mattice, spoke to him about the incident. The Respondent submitted in evidence a written incident report that was placed in Rose's personnel file over this matter. It is dated September 23 and states that the incident happened the day before.

Whenever the incident took place, it appears that no written warning was issued. Rose did not remember whether Converse's ''write up'' was endorsed by a supervisor or whether it was to be placed in his file. He admitted that no formal action was taken against him, but he testified that Morehouse told him that such action would be taken if another such incident of the same kind occurred. Rose also said that he had seen Converse doing the same thing. Morehouse confirmed that he had seen Converse driving over blocks and he stated that Respondent had no specific rule prohibiting this. He was unaware whether Converse had been disciplined or reprimanded for what he had done. Vice President James Bruno testified that he was unaware that Converse had driven over blocks in the past.

Bruno did testify, plausibly in my view, that driving a truck over such blocks presents a safety hazzard and should be avoided. It was thus appropriate for Respondent's officials to remind Rose that this was not to happen again. Neither Rose nor the General Counsel defends what Rose did. More importantly, there is absolutely no evidence that whatever Respondent did—and it was not in the form of a disciplinary warning—was related to Rose's union activities. Nor can I make an inference of discrimination on the evidence that Converse may have done the same thing without being reprimanded. That evidence is insufficient to establish a pattern of disparate treatment that would alone support an inference of discrimination. This allegation will also be dismissed.

The General Counsel also alleges that the tardiness warning issued to Rose on December 3 was discriminatory. This allegation is likewise not supported by a preponderance of the evidence. It is uncontested that Rose was in fact tardy 12 times as set forth in the warning. There is no evidence that this warning was issued because of Rose's union activities. The General Counsel again seeks an inference of discrimination based on disparate treatment, but his anecdotal evidence on this point is refuted by the documentary evidence and the testimony of his own witness, Supervisor Morehouse. It was Morehouse's testimony that Rose had the worst tardiness record of any of the drivers. Rose was late about once or twice a week more than the next worse offender. Rose's generally poor tardiness record was confirmed by timecards introduced in evidence, both his and those of the second worse offender; and it was also confirmed through the testimony of his other supervisor, Mattice. In these circumstances, I shall dismiss the allegation that Respondent issued the December 3 written tardiness warning to Rose because of his union activities.

The complaint also alleges that, in late 1991, Respondent discriminated against Rose by granting him less of a pay raise than that granted to other drivers. The evidence does not support the violation alleged. Rose received a 15-cent-per-hour raise, which was, as were all the raises given at this time, retroactive to August 1, 1991, regardless of when they were approved. Although some drivers received larger raises, 40 or 50 cents, many—actually 10 out of 23 drivers—received no raise at all. Bob Converse, the most senior and highly regarded driver, received no raise. One other driver received the same amount of raise as Rose, 15 cents. Rose

was the third highest paid driver before the raises, even though he stood sixth in seniority, and he remained the third highest after the raises. There is thus nothing in the objective evidence concerning the 1991 raises that would suggest anything out of the ordinary in the relative amount of Rose's raise.

To the extent that the raises reflected Respondent's subjective view of the drivers' work, there is no reason to presume that Rose merited a greater raise than he received. Rose's supervisor, Morehouse, who testified on his behalf, described his evaluation of Rose only as ''fairly good'' or ''moderate.'' There was much testimony about the fact that Rose's evaluation came late in the year and that the first version was returned for an update, but I find nothing sinister in this. It appears that when Rose asked about a raise, someone checked his file and found that it contained no evaluation for him. Respondent directed that one be prepared. Morehouse prepared this first evaluation, but his superior, Vice President Howard Cornwell, found that it was based on conduct before August 1, the date to which the raises were to be retroactive. He sent the evaluation back for a more timely appraisal. This second appraisal was written by Mattice, and it was later revised upward by Cornwell. Morehouse seemed to suggest that he was told to downgrade Rose, but I found his testimony on this issue to have been somewhat confused and ambiguous. I found that the testimony of Mattice and Cornwell, at least on this issue, to be more reliable. In any event, Morehouse's testimony does not establish that Rose's ultimate evaluation was not accurate or that it was used discriminatorily to deny Rose a larger raise than he deserved. Indeed, the General Counsel failed to submit comparable evaluations in evidence so that they could be analyzed in connection with the raises granted by Respondent.

The bottom line on this issue is that Rose's raise was not out of the ordinary when compared with the raises (or nonraises) of other drivers, in terms of seniority, relative pay, and amount. Moreover, it is significant that other union adherents received even greater raises than Rose. Both Mark Rood and Richard Walrath, union adherents who had, unlike Rose, been discriminatorily discharged in the past and reinstated in July 1991, received greater raises than Rose. Walrath received a 50-cent-an-hour raise, the highest amount given in this round of raises. Had Respondent been intent on discriminating on the basis of union activities it would more logically have focused on other more ardent unionists. In these circumstances, I shall dismiss the allegation that Respondent discriminated against Rose in the grant of his 1991 raise because of his union activities.

Finally, the General Counsel alleges that Rose's February 14 1-day suspension for ''standing around'' and not starting work at 6:35 a.m. the day before was unlawful. I disagree. On that occasion, Rose and another rolloff driver, Pete Wimmer, received written warnings and suspensions. They had punched in at 6 a.m., their normal starting time, and had not left the yard by 6:35 when confronted by Mattice, who issued the warnings and suspensions. According to Rose, he, Wimmer, and another driver, Mark Rood, were waiting for their trucks to ''thaw out,'' standing around, talking about their routes and waiting for Mattice, who came on the scene and told them to ''get moving.'' Here again, there is no evidence—even from Rose's own testimony—that he was not standing around the yard 35 minutes after punching in. And there is no evidence that Respondent did what it did because of Rose's union activities. Another employee was subjected to the same punishment for the same offense. There is no possible inference of discrimination on the facts presented.

The General Counsel again attempts to establish discrimination on the basis of disparate treatment. According to the General Counsel, Respondent tolerated other employees standing around and not working without likewise punishing them. The evidence submitted is insufficient to support a finding of disparate treatment. Not only was another employee disciplined in the same manner and for the same offense as Rose, but the fact that Rood was not disciplined for allegedly doing the same thing actually hurts the General Counsel's case. It is unclear from the record whether Rood was as culpable as Rose and Wimmer, but, if he was, this effectively refutes a discriminatory motive because, as I have said above with respect to Rose's raise, Rood was a more likely candidate for union discrimination than was Rose. That Rood was not disciplined on this occasion makes a discriminatory motive unlikely. Other examples of employees allegedly standing around without being disciplined are also not helpful to the General Counsel. These employees were either shown to have different responsibilities or different starting times than the offending rolloff drivers involved here. There is no other credible evidence from which it could be concluded that this particular suspension was the product of union-based discrimination.

Rose's assertion that he and Wimmer, who did not testify, were waiting for their trucks to thaw on this occasion was specifically and effectively refuted by Maintenance Supervisor Richard Downs. He testified that, in the winter months, the drivers' vehicles were warmed up and ready to be driven by 6:20 a.m. at the latest. Even if I accepted Rose's self-serving denial that he had been orally warned about standing around in the past, that he told Mattice that he was sick of being harassed and was told in return that the warning was coming from higher authorities—none of which was attributed to Rose's union activities, this would not support a violation. The facts remain that Rose admitted that he remained in the yard and was not on the road 35 minutes after he had punched in, and another driver who was guilty of the same offense was similarly punished. This allegation will also be dismissed.

C. *The Arno Allegations*

Respondent is alleged to have violated Section 8(a)(1) of the Act by soliciting an employee, on July 17, 1991, to survey and report on Vern Arno's work duties because of his union activities and by informing employees on three separate occasions thereafter that it was seeking to force Arno to quit his employment because of his union activities. The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by notifying Arno on two separate occasions that, contrary to past practice, he had to pay fines resulting from his receipt of traffic citations, by refusing to permit him to work from July 22 to 30, by refusing to permit him to take his breaks and lunch with other employees, by issuing him warnings, including a final warning on September 24, by giving him an adverse evaluation on September 27, and by terminating him on September 30, 1991, all for discriminatory reasons.

1. The facts on the Arno allegations

As I have found in the prior case, Arno, a known union adherent, was discriminatorily discharged by Respondent on April 15, 1991, because of his union activities. In that case, Respondent attempted to use a pretext ''poor attitude,'' which I rejected, to justify the discharge. (315 NLRB at 1132.) Shortly after the April 5 election, Arno advised President Chester Bisnett Sr. that if Respondent failed to address needed changes in working conditions, as it had promised, he would again vote for the Union in any ensuing election. Bisnett Sr.'s response was an unlawful threat to close the operation rather than to accept the Union (315 NLRB at 1131–1132). Shortly after Arno was discharged, he was told by Morehouse that he had ''ticked [Vice President James] Bruno off'' by complaining about wages and hours and supporting the union. Morehouse also told Arno that Arno did not have a ''bad attitude,'' the pretextual reason assigned for his discharge (315 NLRB at 1132.)

Arno, a rolloff truckdriver, was one of the employees reinstated on July 15, 1991, about 3 weeks after the complaint issued in the prior case. On his reinstatement, Arno was not assigned to drive a rolloff truck, which is essentially a dump truck with tailgate loading and unloading. Instead, he was assigned to ride along with and help van driver Larry Rheaume. In this capacity he assisted in picking up debris and delivering bales of animal bedding that had to be handled manually. This was more physically demanding than Arno's former job. At this point, Rheaume was instructed by Cornwell, Mattice, and Morehouse to ''keep an eye'' on Arno and give them a daily report on his work. Rheaume refused to comply on the ground that he was not a supervisor.[1]

After assisting Rheaume on the van for 4-1/2 days, on the afternoon of Friday, July 19, Arno was assigned to drive the van alone. Rheaume apparently had to leave work at noon for personal reasons. Later that afternoon, Arno was stopped by a state trooper who issued him two citations because the vehicle he was driving had a broken tail light and defective brakes. Arno was not permitted to drive the van any farther and he had to call Respondent's office to obtain transportation back to the facility. When he returned, he gave the tickets he had been issued to Morehouse, his immediate supervisor. Morehouse accepted the tickets. However, the next workday, Monday, July 22, Morehouse returned the tickets to Arno, stating that the tickets were Arno's responsibility. Later, when Arno appeared in court, the charges against him were dismissed because the judge stated that Respondent was responsible for the defects that resulted in the citations.

Arno was not assigned any work on July 22 because the brakes on the van were being repaired and he was told that there was no other truck available for him to drive. He was given 2 hours of ''show-up time'' for that day and told to go home. He remained at home and was not again recalled to work until Tuesday, July 30, because, again according to Respondent, there was no work available for him. During this hiatus, Arno asked for, and received, vacation pay for the time he missed work, based apparently on his having earned it during his previous period of employment.

Arno returned to work on July 30 and, because the repairs on the van were apparently still not completed and no other work was available, he was assigned to Respondent's Ogdensburg facility to assemble recycling boxes. He performed this work for 3 days. At some point thereafter, he was finally assigned to drive a rolloff truck, which was his former job.

Sometime in August 1991, after the citations against Arno were dismissed, Arno reported the dismissal and the judge's comments about Respondent's responsibility for the equipment-related citations to Albert Mattice, his other supervisor. Arno told Mattice on this occasion that he believed he was forced to defend himself on the tickets, at great personal inconvenience, because Respondent wanted him to quit. Mattice nodded in assent. On still another occasion in August, when Mattice reported management's refusal to grant Arno a requested leave of absence, Arno told Mattice he believed that his request was denied because management wanted him to quit. Mattice again nodded in assent.[2]

In September, Arno received another citation for driving a truck with a defective tarp covering its load. This case was also dismissed as to Arno. Arno again reported the results of his court proceeding to Mattice with the same statement about Respondent wanting him to quit. Arno insisted that he would not quit.

At some point in the summer of 1991, while Arno was on duty driving a truck on the road, he encountered Skip Bisnett, who was apparently driving his own vehicle. According to Arno, Bisnett ''flipped the finger'' at him while Arno was waiting at a stop sign. Later that same day, Arno asked Bisnett why he had given Arno the finger. Bisnett denied doing so, stating that, if he ever did, he would ''stick it right in your face,'' which he proceeded to do. Bisnett supported Arno's testimony in all respects, except that he denied making the obscene gesture known as the finger to Arno while they passed each other on the road. He testified that, on that occasion, he made a different kind of gesture which had no obscene connotations. I thought Bisnett's testimony in this respect was strained, particularly in view of his admission that he made the obscene gesture to Arno in their face-to-face meeting. Accordingly, in any credibility conflict between Arno, whom I credited in the earlier proceeding, and Bisnett, whom I did not, I credit Arno.

According to Rose's testimony, Bisnett told him about the above incident and confrontation with Arno. Bisnett told Rose that he had a man ''that doesn't know whether he wants to work here or not and I can help him make up his mind.'' Bisnett did not specifically deny having this conversation with Rose, although he did generally deny informing ''employees'' that the Company wanted Arno to quit. I

[1] The above is based on Rheaume's testimony, which I found reliable, detailed, and credible. Cornwell denied making such a statement to Rheaume. However, the testimony of Mattice and Morehouse was not so clearly in conflict. Mattice admitted that Rheame was told to make sure that Arno ''was doing all right . . . make sure that he was being able to do the job.'' (1007.) Morehouse testified but was asked no questions about this issue. It appears that something was said to Rheaume about watching Arno, but the failure of Morehouse to support Mattice makes it more likely that Rheame's version is correct than Mattice's version, which in any event generally supports Rheaume.

[2] Mattice denied in general terms ever telling Arno that management wanted him to quit, but he did not deny that Arno made such accusations in his presence. Nor did he specifically deny nodding assent to Arno's statements, as Arno testified. In these circumstances, and because Arno's testimony was generally reliable, I credit Arno on this point.

credit Rose on this issue not only because of his more detailed testimony, but because I discredited Bisnett in the prior case.

On another occasion in August 1991, Morehouse told Arno that he could not take his breaks in the drivers' coffeeroom or the yard itself, as he had before and as did all other employees. He was told to take his breaks on the road. When Arno asked why, Morehouse said that he was ''bothering some of the workers.'' Arno replied that he believed that management thought he was talking to employees about the Union. Morehouse did not respond and did not refute Arno's testimony on this point.

In fact, on his return, Arno continued speaking on behalf of the Union to the same extent as he did before. Indeed, Mattice testified that he learned ''the most'' about Arno's prounion sentiments after Arno's reinstatement in July 1991. On September 24, Arno was in a group of employees and supervisors that included Bryan Rose, Richard Walrath, Mattice, and Richard Downs. Arno made the statement to the group that he should start parking his car in the front row of the parking lot and write ''Union yes'' across the windshield. Rose corroborated Arno on this point and Mattice testified he could not remember the incident. I credit Arno.

This same day, September 24, at the end of the workday, Arno was called into the office for a conference with Mattice and Morehouse. At this conference, Arno was told of alleged work offenses over the past several weeks. These offenses were listed on an incident report form, dated September 24, together with the dates of the alleged offenses. After a discussion of the alleged offenses themselves, many of which Arno could not remember, and which had not been brought to his attention at the time they occurred, Arno asked for documentation of the alleged offenses. Mattice said he would have to check first with higher management before turning them over to Arno. The next day, Morehouse told Arno that he would have to sign a disciplinary action form, also dated September 24, in order to obtain copies of the underlying documentation. The form stated that Arno was being issued a final warning under the penalty of discharge. Arno refused to sign the form.

The September 24 incident report was placed in evidence by stipulation and without a context. It lists Arno's alleged offenses, including five alleged instances of insubordination, all occurring on September 3. The report includes a criticism of Arno's ''constant complaining [that] causes discord among other employees,'' something that was not part of the listed offenses. The report also states that documentation for the offenses is attached. However, there was no attachment to the exhibit entered in evidence. The record does contain an undated, handwritten document signed by Mattice, also entered in evidence by stipulation, which complains about Arno ''bad mouthing the company'' and details the five alleged instances of insubordination on September 3. Four of the five instances were hearsay reports from Supervisors Allen Bell and Terry Morehouse and nonsupervisor Scott Ramsey. Neither Bell nor Ramsey testified in this proceeding, and Morehouse, who did, was not asked anything about the alleged insubordination involving him. The fifth instance apparently involved Mattice himself, but he testified that Arno may have ''misunderstood'' or ''not heard'' his instructions on that occasion or that there might have been a ''miscommunication.''

On Thursday, September 26, Arno was assigned to drive truck 24, an old, partially rebuilt vehicle that he had not driven for over a year. That truck was normally operated by Walrath, who had driven it the day before, but had been assigned a different truck on September 26. While he was on the road driving truck 24, Arno experienced a problem with the motor ''revving up'' in traffic. He managed to avoid a near collision, and he pulled off the road and shut off the motor. He called the shop and Respondent sent a mechanic's helper, Scott Ramsey, to the site. After Ramsey tried unsuccessfully to rectify the problem, Arno drove the truck slowly back to Respondent's facility, with Ramsey following in his vehicle. When they returned to the shop, Arno was told to wait around while the truck was repaired. Some 10 minutes later, Arno was told by Mattice that the truck was fixed and that the mechanic had ''reamed the floor board where the rod goes through from the pedal.'' Arno questioned whether the repairs had resolved the problem. He said that the pedal was not the problem, rather the ''governor was stuck.'' Mattice nevertheless told Arno to drive the truck. Arno said he would only drive the truck if a qualified mechanic performed a full inspection of the vehicle to alleviate his safety concerns. Mattice did not authorize such an inspection and insisted that Arno drive the truck. Mattice conceded that he never inspected the truck, but merely took a call from an unnamed mechanic who said ''it was all right.'' In any event, Mattice said that he had no other work for Arno and if Arno was not going to drive truck 24 he should punch out and go home, which he did.

The next day, Friday, September 27, Arno came to work and was assigned to drive truck 15, the vehicle he had been driving before he was assigned to truck 24. He worked all day and nothing was said about his refusal to drive truck 24 the day before.

In the meantime, on September 26, Mattice wrote up an incident report on Arno's refusal to drive truck 24. In the report Mattice stated that Arno said that the throttle linkage ''was not free enough to drive'' and that the clutch ''pushed in hard.'' Mattice stated further that the truck was ''known for hard clutch.'' Also on September 26, Respondent prepared a statement for Walrath's signature stating that he had not had any major problems with truck 24 when he drove it and that, when he parked it on September 25, ''there was not anything wrong with the throttle to my knowledge.'' Walrath was asked to sign this statement at the end of the workday on September 26. Another statement appeared in Arno's personnel file, also dated September 26, signed by Head Mechanic Robert Dalton. Although it was signed by Dalton, the statement was prepared by someone else. According to Dalton's statement, he viewed truck 24 as ''sound and safe to drive''; he found no throttle problem. Walrath testified and confirmed the circumstances of his statement. But neither Ramsey, who apparently repaired truck 24 on September 26, nor Dalton, who was not shown personally to have even seen truck 24 on September 26, testified in this proceeding.

On Friday, September 27, Walrath drove truck 24 and experienced the ''same problem'' that Arno had experienced the day before. According to Walrath, ''the throttle linkage was sticking wide open.'' On three separate occasions while he was on the road, Walrath experienced the throttle problem. He managed to unstick the throttle each time, but, after

the last incident, he brought the truck into the shop for repairs. That evening, a mechanic repaired the linkage. After these repairs were completed, Walrath drove the truck again for a few days before it was taken off the road permanently. Thereafter, according to Walrath, truck 24 simply ''sat in the yard.'' Eventually, it was sent to the Parishville facility where, according to Maintenance Supervisor Richard Downs, it is being used ''as a stationary vehicle.''

On Monday, September 30, Arno reported for work as usual and, while he was on the road, he was notified to return to the facility and report to Bruno. He did so. When Bruno and Arno met, Bruno told Arno that he was being fired because he refused to operate truck 24 the previous Thursday. Bruno also presented Arno with a termination notice stating that he was fired for ''failure to cooperate with management.'' It was Bruno who had discriminatorily discharged Arno several months before, under the pretext that he had a bad attitude.

Arno's personnel file contained two evaluations, one dated July 31, 1991, and another dated September 27, 1991, the day after the truck 24 incident. The first evaluation rated him low on work quality (both ''before and present'') and general attitude (the same pretextual reason given for his earlier unlawful discharge). It rated him satisfactory or better on attendance and work completion. Since the evaluation was prepared after only 5 days of work following Arno's reinstatement, it is obvious that most, if not all, of the evaluation was based on an assessment of Arno prior to his earlier unlawful discharge. The second evaluation rated him even worse on work quality and attitude. This evaluation, apparently prepared by Mattice, said that Arno had a ''very opinionated attitude toward management and his job, and job duties'' and that Arno was ''constantly arguing with management.''

2. Analysis of the Arno allegations

The evidence in this case, when considered in the context of Respondent's earlier discriminatory discharge of Arno, and the threats made to him around the time of his earlier discharge, clearly supports the inference, which I make, that Respondent continued its discrimination against Arno after his reinstatement because of his earlier and continued union activities and that Respondent again discharged him because of those same union activities. Respondent's animus against Arno because of his union activities continued unabated from July 15, 1991, when he was reinstated, to September 30, when he was again discharged. Rheaume, his coworker, was instructed to watch Arno for no apparent reason except to report on mistakes which could be thereafter used against Arno because of his union activities. I make this inference not only because of the unusual instructions to Rheaume, who was not a supervisor, but also because of subsequent examples of discriminatory treatment of Arno. This included complaints about Arno's work, which I discuss later in this decision, that were not mentioned to Arno at the time they occurred and were saved for inclusion in a discriminatorily issued final warning. In these circumstances, and in view of the prior discrimination against Arno, I find that Respondent violated Section 8(a)(1) of the Act by directing employee Rheaume to survey and report on Arno's work because of the latter's union activities.

Indeed, the evidence supports the inference, which I also make, that Respondent informed employees that it wanted to force Arno to quit, again because of his union activities. Not only did Mattice not deny such accusations when made by Arno to his face, but Vice President Bisnett specifically told Rose that he would ''help'' Arno in terminating his employment with Respondent. He exhibited his contempt for Arno on another occasion by making an obscene gesture to his face. No other reason for this contempt appears in the record except for Arno's union activities and Respondent's unlawful opposition to them. Bisnett had participated in some of the unfair labor practices found in the earlier case and Arno had continued his union activities after his reinstatement. I therefore find that Respondent gave clear indications that it was seeking to force Arno to quit his employment because of Arno's union activities. This was violative of Section 8(a)(1) of the Act.

It is also alleged that Respondent's refusal to permit Arno to take his breaks with other employees in the yard or in the coffeeroom was discriminatory. I agree that this was violative of the Act. Uncontradicted testimony establishes that Arno was restricted as alleged beginning in early August in circumstances that confirm that this was done because of Arno's union activities. Morehouse told Arno that the restriction was imposed because he was ''bothering'' the other employees and, when Arno suggested that it was done because of his union activities, which had continued unabated after his reinstatement, Morehouse made no response. No other reason for this restriction appears in the record. Accordingly, and in view of other contemporaneous violations directed toward Arno, I find that Respondent violated Section 8(a)(3) and (1) of the Act by restricting Arno's breaks because of his union activities.

Not all of the alleged misconduct directed toward Arno in the summer of 1991 was unlawful. I find, for example, that Respondent's refusal to work Arno from July 22 to 30 was not violative of the Act, as alleged by the General Counsel. It appears that the van Arno was supposed to drive at this time was being repaired as a result of the citation for faulty brakes. The General Counsel has not established that other work was available for Arno. Testimony that there was another truck sitting in the yard at one point during this period is not sufficient to show that other work was available. Moreover, Arno asked for and received vacation pay for the period he was not working. I see no evidence from which I could infer discrimination. Accordingly, I will dismiss the allegation that Respondent discriminated against Arno by not permitting him to work for a week in late July 1991.

The General Counsel also alleges that Respondent violated the Act by causing Arno to defend against traffic citations that ordinarily would have been the responsibility of the Respondent. This allegation involves two sets of citations. The first was for a broken tail light and faulty brakes on the van driven by Rose on July 19; the second was for having a defective tarp in September. I find a violation with respect to the first set of citations, but I will dismiss as to the citation for the defective tarp.

Arno's July 19 citations involved equipment-related problems of the same type that were handled by Respondent in the past. Although some of Respondent's witnesses testified to the contrary, there is record evidence, which I find reliable and plausible, that Respondent took responsibility for equipment-related traffic citations. For example, Rose testified that several times Respondent took responsibility for such cita-

tions of his. On one occasion, he handed a ticket for an uninspected vehicle to a supervisor who took care of the matter without his having to make a court appearance. On another occasion, he was reimbursed for a fine he had paid in connection with a citation. Arno's July 19 citations were of the same general character and he had absolutely no culpability that would cause Respondent not to take responsibility for the citations. On that occasion, he had taken over Rheaume's van at midday. This was his first driving assignment since his reinstatement. Neither Morehouse nor Mattice suggested to Arno that he was responsible for checking the van for any tail light or brake problems before he took over Rheaume's driving assignment. Indeed, if anyone other than Respondent's mechanics was responsible for checking for the defects that later caused the citations on this occasion, it would have been Rheaume. Mattice testified that Rheaume told him that he was having trouble with the brakes on the van. When Morehouse was handed and accepted the tickets submitted to him by Arno, he did not say that Respondent would not take care of them. His silence confirmed Arno's understanding of Respondent's policy with respect to equipment-related citations. That policy was that Respondent would, in effect, take care of paying the fines involved or defend against the citations. Nevertheless, the next workday, after apparently checking with his superiors, Morehouse handed the tickets back to Arno and told him the matter was entirely his responsibility.

As a result of Respondent's refusal to take responsibility for these equipment-related citations, Arno was forced to defend himself against the citations, which were eventually dismissed as to him with the observation by the judge that they were the responsibility of Respondent. He spent some 4 hours of his own time traveling to the courthouse, waiting for his case to be called and participating in the case itself. In view of Respondent's animus toward Arno, as expressed in the prior case and in the violations I have found above, I find that Respondent's refusal to take responsibility for Arno's equipment-related citations of July 19, contrary to its past practice, was discriminatory. By forcing Arno personally to defend against these citations, which were dismissed as to him, Respondent violated Section 8(a)(3) and (1) of the Act.

While I am somewhat suspicious of Respondent's refusal similarly to take responsibility for Arno's defective tarp citation, I will dismiss the allegation that Respondent violated the Act in the way it treated Arno with respect to that citation. This situation is different, in my view, from the situation surrounding the July 19 citations. It is not clear, as it was in the earlier set of citations, that Arno was not culpable. Unlike equipment-related citations, a defective tarp is easily observable by a driver. The evidence is not clear whether Arno himself had the responsibility to change the tarp or to obtain a new tarp, but he certainly could have asked about one. Respondent kept tarps in a location that was easily accessible and known to drivers. Moreover, Arno's citation for this offense was dismissed with no major unconvenience, unlike the situation in the earlier citations. Since the burden of proving discrimination in each case falls on the General Counsel and the evidence on this allegation stands in equipoise, at best, I shall dismiss this allegation.

This brings me to the final week of Arno's second stint of employment. It is alleged that Respondent's final warning of September 24 and its adverse evaluation of September 27 were discriminatory and unlawful. I agree. In view of Respondent's continuing animus and discrimination against Arno, as mentioned and found above, and the timing of the September 24 final warning, issued the same day as Arno reemphasized his prounion sympathies in the presence of Mattice, who issued him the warning, I find that the General Counsel has at least established a prima facie case of discrimination. I also find that the alleged offenses listed in the September 24 incident report that supported the final warning were pretexts and would not have supported such a warning in the absence of Arno's recently restated prounion sympathies.[3]

These alleged offenses were not and could not have been substantial ones because they were not mentioned to Arno at the time they occurred. Moreover, on the witness stand, Arno gave perfectly plausible explanations for them that negated any serious culpability on his part. These explanations were, for the most part, not directly contradicted. For example, in four of the five alleged instances of insubordination mentioned in the September 24 incident report, the people to whom Arno was allegedly insubordinate did not testify to refute Arno's explanations, and Mattice, who did testify about the instance involving him, conceded that this may have been the result of a possible miscommunication. It defies common sense that a person who has really been insubordinate five times in 1 day would not be warned or disciplined at the time. Yet, this is what supposedly happened here. Respondent held back and neither said nor did anything to Arno until over 3 weeks later when it issued him a final warning. Actually, Mattice was not content simply with testifying about the alleged offenses in the September 24 incident report. He even testified about an alleged offense that was not mentioned in the report. Finally, his reference, in the incident report, to Arno's complaining to management and creating ''discord'' among employees sounds much like the same bad attitude that was used by Respondent as a pretext to justify Arno's earlier discharge. These references infect all of the alleged improprieties listed in the report. In these circumstances, I must reject Respondent's underlying reasons for both the September 24 incident report and the final warning as pretexts.

The above strongly suggests that Respondent was attempting to build a record against Arno. This supports my earlier finding that Respondent was watching Arno and suggested that it was trying to get him to quit. Thus, Respondent's pretextual explanations for the final warning and the underlying incident report are not only insufficient to overcome the General Counsel's prima facie showing of discrimination, but tend to buttress that finding. Accordingly, I find that by issuing the September 24 final warning, based on the underlying pretextual incident report, Respondent violated Section 8(a)(3) and (1) of the Act.

Since Arno's September 27 evaluation was based, at least in part, on what I have found was an unlawful final warning issued 3 days before, I find that it too was unlawful. In addition, the references in that evaluation to Arno's disagreements with management and his attitude problems harken back to Arno's previous discriminatory discharge that Re-

[3] My analysis of the discrimination allegations here is in accordance with the *Wright Line* test explicated in greater detail in my prior decision (315 NLRB at 1125–1126).

spondent defended on the pretext that he had a bad attitude. This echo of things past in the evaluation, like a similar echo in Mattice's notes and the September 24 incident report, amounts to a continued criticism of Arno's continued union support, which was openly exhibited as late as September 24. It is clear that, despite Respondent's efforts in harassing Arno, he had not capitulated and was not cured of his prounion tendencies. This undoubtedly affected his evaluation. Finally, this evaluation was prepared after the truck 24 incident, which eventually led to his discharge, a discharge that, as I find below, was itself discriminatory. In the context of this unlawful conduct toward Arno, I find that the adverse evaluation of September 27 was likewise discriminatory, and Respondent's explanations for it pretextual. The evaluation was thus violative of Section 8(a)(3) and (1) of the Act.

I now turn to the termination itself. Bruno, who terminated Arno on Monday, September 30, as he had several months before, based it solely on Arno's refusal to drive truck 24. However, it appears that Respondent was less concerned with the impact on its operations of the loss of a driver, as to which there is no evidence, than with Arno's continued bad attitude, the reason that had ostensibly caused his earlier unlawful discharge. Thus, the termination notice mentioned nothing about the refusal to drive truck 24; it simply mentioned a failure to cooperate with management. Moreover, the discharge itself did not come until after Arno had worked a full day and part of another after the truck 24 incident. In the meantime, and without mentioning anything to Arno about possible disciplinary action as a result of the truck 24 incident, Respondent was seeking documentation to support Arno's discharge. The accumulation of such secret documentation and the delay in effectuating the discharge, together with the context of other unlawful conduct directed toward Arno at this time, and in the earlier case, supports the inference, which I make, that the General Counsel established at least a prima facie case of discrimination as to the termination itself.

I also find that the truck 24 incident was not the real reason for Arno's discharge, but was a pretext used by Respondent in an attempt to justify Arno's termination. A close analysis of the evidence supports the inference that Arno was set up for discharge and that the incident itself would not have resulted in Arno's termination but for his union activities. Respondent's explanations are insufficent to overcome the prima facie case of discrimination established by the General Counsel. Truck 24 was an old and tattered truck. Its assignment to Arno on September 26 was highly unusual. It was normally driven by Walrath, who drove it both the day before Arno did and the day after. Walrath was assigned to drive another truck on September 26. Arno drove truck 24 only that 1 day. Mattice, who made the assignments, conceded that it was unusual for drivers to be assigned to trucks other than those they normally operate, and he could not remember why he switched Arno and Walrath on September 26.

When Arno took truck 24 on the road, he experienced a serious throttle problem that nearly resulted in an accident. Even though the truck was allegedly repaired later that day, Walrath, who drove it the very next day, experienced the very same problem with truck 24. The truck was again repaired, this time on September 27 and, within days, it was retired from service on the public roads. By Monday, September 30, when Arno was fired, Respondent knew that, on Friday, September 27, Walrath had the same problem with truck 24 that led to Arno's refusal to drive it the day before and that new repairs had to be made to the truck. Arno was thus proved correct in insisting that the repairs performed on September 26 were not adequate. That Respondent nevertheless went ahead with the discharge in these circumstances refutes any contention that the discharge was not discriminatory. Indeed, Respondent's treatment of Arno in the truck 24 incident demonstrates the depth and breadth of its union animus. Respondent would not have treated Arno in this manner and discharged him to boot, but for a deeply rooted, union animosity directed toward him. This record, as well as the previous one, provides evidence of such animosity.

In sum, I find that Respondent terminated Arno on September 30, 1991, because of his union activities, as it had terminated him earlier for such activities. Bruno was involved in both discharges. He used Arno's refusal to drive an unsafe truck as a pretext on this occasion, just as he used bad attitude as another pretext in the earlier termination of Arno in April 1991. Thus, I find that Respondent has again discharged Arno in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By granting benefits to employees to dissuade them from supporting a union, by interrogating its employees about their union sympathies and the union sympathies of their fellow employees, by soliciting employees to survey and report on the work duties of another employee because of his union activites, and by informing employees that it wanted to force an employee to quit his employment because of his union activities, Respondent violated Section 8(a)(1) of the Act.

2. By issuing warnings, adverse evaluations, and otherwise harassing employee Vern Arno and by thereafter terminating him, all because of his union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. These violations constitute unfair labor practices within the meaning of the Act.

4. Respondent has not otherwise violated the Act.

THE REMEDY

I shall order the Respondent to cease and desist from the unfair labor practices found here, and to take certain affirmative action necessary to effectuate the policies of the Act. Nothing in the Order shall be construed as requiring Respondent to rescind benefits already granted. However, Respondent will be ordered to fully and immediately reinstate employee Vern Arno to his former position or, if such position no longer exists, to a substantially equivalent position and to make him whole for any loss of earnings or benefits he may have suffered because of its unlawful treatment of him, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the above findings of fact and conclusions of law, and, on the entire record, I issue the following recommended[4]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

Continued

ORDER

The Respondent, Waste Stream Management, Inc., Canton and Potsdam, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities and the union activities of other employees.

(b) Granting its employees various benefits in a revised employee handbook in order to dissuade employees from supporting the Union.

(c) Soliciting employees to survey and report on the work duties of employees and informing employees that it seeks to force employees to quit, because of their union activities.

(d) Issuing warnings and adverse evaluations to, and harassing and terminating employees or otherwise discriminating against them because they engage in union activities or in order to discourage union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employee Vern Arno immediate and full reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision, and expunge from its personnel records any references to his final warning, evaluation, and termination and notify him, in writing, that this has been done and that evidence thereof will not be used as a basis for any future personnel actions against him.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Potsdam, Canton, Gouverneur, Ogdensburg, and Parishville, New York, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees concerning their union activities and the union activities of other employees.

WE WILL NOT grant our employees various benefits in a revised employee handbook in order to dissuade employees from supporting the Union.

WE WILL NOT solicit employees to survey and report on the work duties of employees and inform employees that it seeks to force an employee to quit, because of their union activities.

WE WILL NOT issue warnings and adverse evaluations to, harass and terminate employees or otherwise discriminate against them because they engage in union activities or in order to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Vern Arno immediate and full reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, and WE WILL expunge from our personnel records any references to his final warning, evaluation, and termination and nofity him, in writing, that this has been done and that evidence thereof will not be used as a basis for any future personnel actions against him.

WASTE STREAM MANAGEMENT, INC.